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Susan H. Kuhbach
Senior Office Director for Import Administration
U.S. Department of Commerce
14th Street and Constitution Avenue, NW
Room 1870
Washington, DC 20230

Re: Application of the Countervailing Duty Law to Imports from the People's Republic of China: Request for Comment

Dear Ms. Kuhbach:

These comments are filed on behalf of the Polyethylene Retail Carrier Bag Committee ("PRCB Committee") in response to the Department's *Federal Register* notice soliciting comments on the applicability of the U.S. countervailing duty ("CVD") law to imports from the People's Republic of China ("China"). The PRCB Committee -- an ad hoc coalition of U.S. manufacturers of polyethylene retail carrier bags ("PRCBs") -- was the petitioner in antidumping duty cases brought against imports of PRCBs from China, Malaysia, and Thailand in 2003. PRCBs are also referred to as t-shirt sacks, merchandise bags, grocery bags, or checkout bags.

The Chinese Government has clearly used subsidies to promote the rapid development and competitiveness of the export-oriented Chinese PRCB industry. The PRCB Committee, however, was deterred from filing a CVD petition along with its antidumping petition due to the Department's practice of not imposing CVDs on imports from non-market economy ("NME")

countries. The PRCB Committee appreciates the Department's willingness to reexamine this practice in reaction to the petition filed by NewPage Corporation with respect to subsidies on coated free sheet paper from China.

For the reasons discussed below, the PRCB Committee urges the Department to change its practice and to apply CVD measures to imports from China and other NMEs. Failing to do so would give China a green light to continue subsidizing export oriented industries at a time when its trade surplus with the United States is at record levels and still growing. Since joining the World Trade Organization ("WTO") in 2001, China has seen the dollar value of its exports grow at an average rate of approximately 30 percent per year, compared with annual growth of about 12.5 percent over the five years before gaining WTO membership.[1] In addition, China's current trade surplus with the United States is now the largest in history. Over the past 10 years, it has increased fivefold, with the surplus for 2006 expected to be roughly 230 billion dollars.[2] Given these facts, the United States must be willing to apply all WTO-sanctioned trade remedies against imports from China, including countervailing duties.

I. THE SCM AGREEMENT AND CHINA'S WTO ACCESSION PROTOCOL PERMIT WTO MEMBERS TO APPLY COUNTERVAILING MEASURES TO IMPORTS FROM CHINA

The U.S. CVD statute, as amended by the Uruguay Round Agreements Act, is intended to implement U.S. obligations under the WTO Subsidies and Countervailing Measures Agreement ("SCM Agreement"). The statute's language closely tracks that of the SCM Agreement. The Agreement permits WTO Members to impose CVDs on subsidized imports and

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[1] Prepared Remarks of Federal Reserve Chairman Ben S. Bernanke at the Chinese Academy of Social Sciences, Beijing, China: "The Chinese Economy: Progress and Challenges," Dec. 15, 2006.

[2] U.S. Census Bureau, Foreign Trade Division, Data Dissemination Branch.

nowhere exempts imports from an NME country. In particular, the language defining a subsidy in Article 1 of the Agreement makes no distinction between market economies and NMEs and plainly applies to both types of economies.

The applicability of the SCM Agreement to China is made abundantly clear by Article 15 of China's WTO Accession Protocol, in which China agreed to subject itself to subsidies disciplines. Among other things, Article 15(b) of the Protocol permits the application of third-country information in CVD determinations. Article 15(b) is not premised on the concept that China has achieved market economy status and thus applies regardless of the nature of China's economy. The Protocol permits WTO members to continue to treat China as an NME for antidumping purposes for up to 15 years from the date of China's accession, and there is absolutely no linkage in the terms of the Protocol between China's NME status and the applicability of CVD measures to that country.

Under Article 10.2 of the Protocol, China further agreed that subsidies provided to state-owned enterprises will be viewed as specific (and, thus, actionable and countervailable) if state-owned enterprises are the predominant recipients of such subsidies or state-owned enterprises receive disproportionately large amounts of such subsidies. This provision allows WTO members to regard such subsidies as specific without regard to the particular sector in which they operate.

Under Article 10.3 of the Protocol, China agreed, among other things, to eliminate all export subsidies and subsidies that are conditioned upon the use of either domestic goods or export performance.

China also agreed to notify the WTO of all subsidies as required by Article 25 of the SCM Agreement. In April 2006, the Government of China notified 78 subsidies to the WTO.

These subsidies include various types of tax preferences, exemptions on duties payable on imported raw materials and equipment, and various other benefits. Thus, the Chinese Government has admitted providing subsidies to its industries. The most heavily subsidized industries are believed to be those with an export orientation, such as the Chinese industry producing PRCBs.

Given the broad coverage of the SCM Agreement and the provisions negotiated in China's Accession Protocol, there is no question that China is covered by the SCM Agreement's disciplines and remedies. China would not have negotiated the terms of the Accession Protocol discussed above if it were not clearly covered by the SCM Agreement. In turn, it makes no sense that the U.S. CVD law, which was drafted to conform to the Agreement, should be construed as not applying CVD remedies to imports from China. In any event, as discussed below, it is clear that the CVD statute requires the Department to apply the CVD statute equally to imports from all countries, including China.

II. THE STATUTE REQUIRES THE DEPARTMENT TO APPLY COUNTERVAILING DUTIES TO IMPORTS FROM CHINA

A. The CVD Statute Applies To Both Market And Non-Market Economies

In interpreting a statute, the starting point is the statutory language itself. Where the language is clear and unambiguous, the statute should be applied in accordance with its terms.[3] The statute requires the Department to impose a countervailing duty if, among other things, it "determines that the government of a country or any public entity within the territory of a country is providing, directly or indirectly, a countervailable subsidy with respect to the

[3] *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1 (2000); *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). *See also Chevron USA v. Natural Resources Defense Council*, 467 U.S. 837 (1984) ("If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.").

manufacture, production, or export of a class or kind of merchandise imported, or sold (or likely to be sold) for importation, into the United States . . . ." 19 U.S.C. § 1671. The statute further broadly defines a "country" as "a foreign country, a political subdivision, dependent territory, or possession of a foreign country . . . ." 19 U.S.C. § 1677(3). Nothing in this provision or elsewhere in the statute qualifies or limits the broad language applying CVD remedies to every "country," meaning that it applies equally to imports from all nations, including China.[4] Thus, the Department is required to impose CVDs on imports from China on the same basis as for other countries.

In addition, the statute defines a countervailable subsidy without limiting its application to any particular set of countries or any type of foreign economy. In language that tracks Article 1 of the SCM Agreement, the statute generally defines a "countervailable subsidy" as one that is specific and confers a benefit by means of a financial contribution, any form of income or price support within the meaning of Article XVI of the GATT 1994, or a payment to a funding mechanism to provide a financial contribution. 19 U.S.C. § 1677(5)(A) & (B). This definition is not confined to activities that can be engaged in only by the government of a market economy.

In fact, nowhere does the statute, including the provision for the initiation of a CVD investigation, 19 U.S.C. § 1671a, mention NME countries generally or China in particular. This omission is telling. Had Congress intended to provide an exception for NME countries from the Department's broad statutory authority to conduct CVD investigations and the broad definition of a countervailable subsidy, it surely would have done so explicitly in the statute. Thus, the

[4] The Department itself has acknowledged that "there is no explicit statutory bar against applying the CVD law to NME countries" and that "it is inaccurate to state that the Department does not currently accept CVD petitions against China." GAO Report 05-474, *U.S.-China Trade: Commerce Faces Practical and Legal Challenges in Applying Countervailing Duties* (June 2005) ("GAO Report"), Appendix III (DOC Response to GAO Report on China and CVD).

Department is required by the statute to treat NME imports the same as imports from all other countries.

Where the language of a statue is unambiguous, that ends the inquiry, and resort to external aids to interpretation is unnecessary.[5] Nevertheless, there is nothing in the legislative history of the statute to contradict its plain meaning. When the statute was originally enacted as part of the Trade Agreements Act of 1979, the legislative committee reports were silent with respect to the applicability of CVD remedies to NME countries.[6] Once again, if Congress had intended to exclude NME countries from the broad scope of the statute, it presumably would have made this intent explicit. Notably, in amending the law repeatedly since 1979, including two major revisions (the 1988 Omnibus Trade Act and the 1994 Uruguay Round Agreements Act), Congress has never once indicated that the law does not apply to NME countries, nor has it suggested that the straightforward language of the statute should apply differently to such countries.[7]

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[5] *United States v. Gonzalez*, 520 U.S. 1 (1997).

[6] *See* S. Report 96-249 (1979); H.R. Rep. 96-317 (1979).

[7] A reference to the Federal Circuit's decision in *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986), in the Statement of Administrative Action ("SAA") that accompanied the 1994 Uruguay Round Agreements Act ("URAA"), H. Doc. 103-316, Vol. 1, at 926 (1994), is not to the contrary. The SAA merely responded to a NAFTA binational panel decision that cited *Georgetown Steel* for the proposition "that in order to find certain government practices to be subsidies, Commerce must determine that the practice has an effect on the price or output of the merchandise under investigation." The SAA noted that the panel's "majority misinterpreted the holding in *Georgetown Steel* . . ., which was limited to the reasonable proposition that the CVD law cannot be applied to imports from nonmarket economy countries." *Id.* Thus, the statement in the SAA was not intended to address whether to apply CVDs to imports from NME countries, but only restated the decision in *Georgetown Steel* to contradict the panel's decision. Nothing in the SAA directly addresses the Department's legal authority to apply CVDs to NMEs. In any event, as discussed below, *Georgetown Steel* did not hold that the Department is prohibited from applying the CVD law to imports from NMEs.

B. The Requirement That The Department Apply The CVD Law To Imports From China Is Unaffected By *Georgetown Steel*

In arguing that the statute does not allow the Department to investigate countervailable subsidies with respect to imports from NME countries, opponents of applying CVD remedies most often rely upon the Federal Circuit's decision in *Georgetown Steel.*[8] For a number of reasons, however, that case is no impediment to such an investigation and, in fact, is no longer applicable as precedent.

Georgetown Steel involved CVD investigations of carbon steel wire rod from Czechoslovakia and Poland and potassium chloride from the Soviet Union and the German Democratic Republic that were conducted under the since-repealed section 303 of the Tariff Act of 1930. Section 303 provided that, where merchandise from a country that was not a signatory to the GATT Subsidies Code was involved, a countervailing duty should be levied

> {w}henever any country, dependency, colony, province, or other political subdivision of government, person, partnership, association, cartel, or corporation, shall pay or bestow, directly or indirectly, any bounty or grant upon the manufacture or production or export of any article or merchandise manufactured or produced in such country, dependency, colony, province, or other political subdivision of government . . . .

In its final determinations in the carbon steel wire rod investigations, the Department "concluded that bounties or grants, within the meaning of section 303, cannot be found in nonmarket economies."[9] In doing so, however, the Department first noted that, in light of the statutory

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[8] *Georgetown Steel Corp. v. United States*, 801 F.2d 1308 (Fed. Cir. 1986) ("*Georgetown Steel.*")

[9] *Carbon Steel Wire Rod from Czechoslovakia*, 49 Fed. Reg. 19370 (May 7, 1984); *Carbon Steel Wire Rod from Czechoslovakia*, 49 Fed. Reg. 19374 (May 7, 1984).

language applying section 303 to "any country, dependency, colony, province, or other political subdivision," no "political entity is exempted *per se* from the countervailing duty law."[10]

The Department further stated, however, that this conclusion did not address "the additional jurisdictional question" of "whether government activities in an NME confer a 'bounty or grant' within the meaning of section 303."[11] It reasoned that bounties or grants could not be found in NMEs, because a bounty or grant is an "action that distorts or subverts the market process and results in a misallocation of resources, encouraging inefficient production and lessening world wealth." Because resources are not allocated on a market basis in an NME, "{t}here is no market process to distort or subvert."[12] Thus, "{i}t is this fundamental distinction -- that in an NME system the government does not interfere in the market process, but supplants it -- that has led us to conclude that subsidies have no meaning outside the context of a market economy."[13]

On appeal, the Federal Circuit held that the statute allowed the Department the discretion not to apply CVD remedies to NMEs and deferred to the Department's decision not to do so.[14] Noting an earlier decision that "the agency administering the countervailing duty law has broad

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[10] 49 Fed. Reg. at 19371, 19375.

[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] As the Department stated in its December 15, 2006 *Federal Register* notice seeking comments on this issue, the Federal Circuit in *Georgetown Steel* affirmed that the Department of Commerce . . . has the discretion not to apply the countervailing duty (CVD) law to non-market economy (NME) countries." 71 Fed. Reg. at 75507.

discretion in determining the existence of a 'bounty' or 'grant' under that law,"[15] the court held that it could "not say that the Administration's conclusion that the benefits the Soviet Union and the German Democratic Republic provided for the export of potash to the United States were not bounties or grants under section 303 was unreasonable, not in accordance with law or an abuse of discretion."[16]

Thus, the Federal Circuit merely deferred to the Department's determination not to apply the CVD law to imports from two NME countries, based on the record of the 1984 investigations of wire rod from Czechoslovakia and Poland. The court did *not* hold that section 303 prohibited the Department from applying CVDs to NME countries.[17] Moreover, the Federal Circuit's 20-year-old precedent in *Georgetown Steel* is no longer applicable, because it involved construction of a CVD statute that no longer exists.[18] Section 303 of the Tariff Act of 1930 was repealed by the URAA.

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[15] *Id.* at 1318, citing *United States v. Zenith Radio Corp.*, 562 F.2d 1209, 1219 (C.C.P.A. 1977), *aff'd*, 437 U.S. 443 (1978).

[16] *Georgetown Steel*, 801 F.2d at 1318.

[17] In *dicta*, the Federal Circuit reviewed other trade legislation that was enacted after section 303, stating that "Congress elected to deal with the problem {of unfairly traded imports from NMEs} under the antidumping law and not under the countervailing duty law." *Id.* at 1318. Opponents of applying CVDs to NME countries frequently cite this portion of the court's decision. The only issue before the court, however, was whether the CIT should have deferred to the Department's discretion in construing the statute in the absence of clear Congressional direction, *not* whether the statute prohibited the Department from applying CVDs to NMEs. This is clear, among other things, from the court's ultimate holding that it could "not say that the Administration's conclusion "that the economic incentives and benefits that the {exporting countries} provided . . . do not constitute bounties or grants under section 303 of the Tariff Act of 1930, as amended, were not bounties or grants under section 303 was unreasonable, not in accordance with law or an abuse of discretion." *Id.*

[18] Opponents of applying CVDs to imports from China often argue that Congress has "acquiesced" in *Georgetown Steel*'s ruling regarding the applicability of the CVD law to NMEs. Given that *Georgetown Steel* dealt solely with a statute that has since been repealed, this argument makes no sense. There cannot possibly be any Congressional acquiescence with respect to the scope of the current CVD law, which was not at issue in *Georgetown Steel*. Moreover, even assuming *arguendo* that some

No court has ever decided the issue of whether the Department is permitted to apply the current CVD statute to NME imports. As discussed above, in *Georgetown Steel*, neither the Department nor the court questioned that section 303's coverage of imports from "any country, dependency, colony, province, or other political subdivision of government" was broad enough to apply to an NME. Rather, the issue was whether the Department could reasonably conclude that the government of an NME was not capable of providing a "bounty or grant" within the meaning of section 303 because of the supposed impracticality of determining subsidy benchmarks in an NME. Since *Georgetown Steel*, the CVD statute has been amended to provide explicit, detailed definitions of both a subsidy and a countervailable subsidy. 19 U.S.C. § 1677(5). The current statute does not use the ambiguous "bounty or grant" language of section 303 and instead uses language that broadly defines a subsidy in terms of financial contributions and benefits that can be provided by a government in either a market economy or an NME.

III. CONCLUSION

The Department's practice regarding NME countries has not been reexamined in light of the WTO SCM Agreement and the current statutory language that requires applying CVD remedies on the same basis for imports from China as for imports from other countries. Clearly, the Department has a statutory mandate for investigating illegally subsidized goods imported from China. The Department's practice is based on its conclusions with respect to the difficulty of determining subsidy benchmarks in the totalitarian economic regimes that prevailed in Eastern Europe 20 years ago and requires a thorough reconsideration. It does not reflect current reality

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sort of Congressional "acquiescence" has occurred, it could only involve the actual holding in *Georgetown Steel*, *i.e.*, that the Department had discretion under section 303 not to apply CVDs to NME imports, *not* that the Department was barred from doing so under that statute (much less under the current law).

with respect to China, which has been in an economic transition for many years and relies far less on central planning than before.

In addition, the Chinese Government in recent years has aggressively subsidized a wide variety of Chinese manufacturers to promote the development of favored industries. The unfair advantages these subsidies provide Chinese exporters of PRCBs and other products are a major catalyst for China's growing trade surplus with the United States. Subsidized imports from China distort trade and economically harm U.S. industries as much as, or more than, subsidized market economy imports. Under the CVD statute, they must also be remedied in the same manner as other imports.

Thank you for considering these comments of the PRCB Committee.

Sincerely,

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